FCC 96-78

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation	)	DA 91-577
of Satellite Earth Stations	)	45-DSS-MISC-93
	)	

REPORT AND ORDER
FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 29, 1996 Released: March 11, 1996

Comment Date: April 15, 1996
Reply Comment Date: May 6, 1996

By the Commission: Commissioners Barrett and Chong issuing separate statements.

Introduction

1. In this Report and Order, the Commission adopts revisions to its rule preempting certain local regulation of satellite earth station antennas. Our new rule clarifies the preemption standard and establishes procedures for Commission enforcement of its rules. In crafting the new rule, we have carefully considered the very weighty and important interests of state and local governments in managing land use in their communities. Against those interests, we have balanced the federal interest in ensuring easy access to satellite-delivered services, which have become increasingly important and widespread in the last few years and are dependent upon rapid and inexpensive antenna installation by businesses and consumers. We believe that the revised preemption rule accommodates both federal and non-federal interests and provides the Commission with a method of reviewing disputes that will avoid excessive federal involvement in local land-use issues.

2. In addition, we issue a Further Notice of Proposed Rulemaking (Further Notice) to implement section 207 of the Telecommunications Act of 1996.[1] That section directs the Commission to preempt nonfederal restrictions on certain direct-to-home video services, including Direct Broadcast Satellite (DBS) service. In our Further Notice, we tentatively conclude that the final rule adopted in this Report and Order fulfills the

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (hereinafter "1996 Act").

Commission's obligation under the new statutory provision as to nonfederal, governmental restrictions on DBS-type satellite earth station antennas. We also propose a new paragraph (f) for our preemption rule in order to implement section 207 with regard to private, nongovernmental restrictions on DBS-type satellite earth station antennas.

Background

3. The original preemption rule was adopted in 1986 in response to evidence that state and local governments were, in some instances, imposing unreasonably restrictive burdens on the installation of satellite antennas. The 1986 rule preempted ordinances that discriminate against satellite antennas and impose unreasonable limitations on reception or unreasonable costs on users.[2] In addition, in the order adopting the rule,[3] we stated that anyone coming to the Commission for relief in a particular zoning dispute must first exhaust all non federal remedies, including all litigation remedies.

4. Several events since 1986 have led us to conclude that our rule should be revised at this time. For example, in 1992, the U.S. Court of Appeals for the Second Circuit invalidated our exhaustion of remedies policy.[4] In addition, antenna users, local governments, and Commission staff have gained experience in this area and have found that several aspects of the 1986 rule are problematic.[5] Finally, representatives of two satellite industry groups filed requests for declaratory rulings in connection with our preemption rule. The Satellite Broadcasting and Communications Association (SBCA), representing the interests of direct-to-home video service providers and users, urged the Commission to clarify its rule and to adopt enforcement procedures. Similarly, Hughes Network Systems (HNS), a provider of satellite communications for business uses, requested a ruling that local restrictions are per se unreasonable if imposed on very small aperture terminals (VSATs) that measure less than two meters in diameter and are installed in commercial areas.

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[2] 47 C.F.R. § 25.104

[3] In re Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519 (Feb. 14, 1986) (1986 Order).

[4] Town of Deerfield v. FCC, 992 F.2d 420 (2d Cir. 1993)(Deerfield). (In this case, the court held that the Commission could not review or reverse federal court judgments. "Article III courts 'render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action'." Id. at 428 (citations omitted)).

[5] For example, Commission staff members have received numerous telephone calls from consumers and from local government representatives expressing concerns about the application and enforcement of the old rule.

5. In the spring of 1995, we adopted a Notice of Proposed Rulemaking[6] responding to these events. The Notice tentatively concluded that our preemption policies, including procedural rules, must be revised. Accordingly, in the Notice, we proposed to review local disputes after exhaustion of only nonfederal administrative remedies, not all non-federal legal remedies. We proposed new standards to determine the reasonableness of non-federal regulations, and created two categories of rebuttable presumptions for small antennas. Finally, we proposed procedures by which state and local governments authorities can request a waiver of the rule in cases where unusual circumstances are demonstrated.

6. In the Notice, we described how our proposed rule would apply in different ways to satellite antennas of different types and sizes. These antennas fall into two basic categories, depending on the service provided. The first category consists of antennas designed for direct-to-home (DTH) reception of video programming for home entertainment purposes. At this time, DTH uses two different frequency bands for transmission. In the Ku-band (12/14 GHz), service can be provided with antennas less than one meter in diameter.[7] In the C-band (4/6 GHz), antenna diameters are as small as six feet (approximately 2 meters) and typically around seven and one-half feet (approximately 2.5 meters).[8] These C-band antennas provide different programming that is sometimes not available to smaller antenna users. DTH antennas are receive-only and do not have transmitting capabilities. The second broad category of antennas is designed for two-way, commercial communications. These antennas both transmit and receive. The smallest of these are often referred to as VSATs and provide satellite communications network services to retail establishments such as gas stations, store chains, banks, and brokerage services.[9] These antennas are located in the same areas as the commercial facilities they serve. Most VSAT antennas are less than two meters in diameter. Other satellite services are provided by larger transmit/receive antennas that are generally associated with commercial facilities. Our proposals reflect differences in these various types of antennas.

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[6] Preemption of Local Zoning Regulation of Satellite Earth Stations, 10 F.C.C. Rcd. 6982 (1995)(Notice).

[7] DTH is provided in two different portions of the Ku-band. With medium power satellites such as those currently used by Primestar and Alphastar, receiving antennas average .75 meters or approximately 29 inches. In the high powered DBS service provided in another portion of the Ku-band, antennas as small as 18 inches can be used. DBS is provided by DIRECTV and USSB and other permittees are scheduled to begin service in the near future.

[8] SBCA comments at 23.

[9] Comments of Service Merchandise, Target Stores, Builders Square, Edward D. Jones, and Amoco Oil Corp.

7. In response to the Notice, we received extensive comments from satellite industry representatives and from local governments.[10] In general, industry representatives stress that our preemption rule must be clear and easy to apply, and they recommend some modifications to our proposal to accomplish this goal. Local government representatives strongly oppose any greater federal preemption, but generally concede that Commission enforcement procedures are necessary in light of Deerfield.

8. After our receipt of comments in this matter, Congress enacted legislation which directly impacts some of the issues in the rule making proceeding. Specifically, section 207 of the 1996 Act directs the Commission to promulgate regulations:

> to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals multichannel, multipoint distribution service, or direct broadcast satellite services.[11]

Although we seek comment on the impact of the legislation in the Further Notice, we have decided to proceed with the issuance of this Report and Order. For the reasons stated in paragraph 4 above, we feel that it is crucial to put a revised rule in place as quickly as possible. Moreover, the revised rule proposed in the Notice and adopted here applies to a variety of services provided by all sizes of satellite dishes, not just direct broadcasting services provided by 18" dishes. Finally, as explained in the Further Notice, we tentatively conclude that insofar as governmental restrictions are concerned, our newly adopted preemption rule is a reasonable way to implement section 207 with regard to DBS antennas. After reviewing the comments submitted in response to the Further Notice, we will determine whether further adjustments to our rule are warranted.

Discussion

9. Comments filed in this proceeding raise issues that fall into two main categories: those relating to the Commission's general approach to preemption of local zoning regulations and those relating to particular sections of the rule. Within the first category, some commenters challenge the Commission's legal authority to preempt local zoning regulations, others address the adequacy of the existing preemption rule, and others discuss the merits of a rule based on presumptions of unreasonableness. We address these comments below.

A. General Rule Approach

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[10] A list of commenters is attached as Exhibit A.

[11] 1996 Act § 207.

1. Legal Authority to Preempt

10. Several local government representatives challenge the Commission's legal authority to adopt the proposed rule. These commenters assert the Commission has not been given express authority in this area and that the federal interest has been overstated.[12] On many occasions, the Supreme Court has articulated standards for federal preemption of non-federal regulation. In City of New York v. FCC, 486 U.S. 57 (1988), the Court explained:

> When the Federal government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind by stating that 'the Laws of the United States which shall be made in Pursuance' of the Constitution 'shall be the supreme Law of the Land.' U.S. Const. Art. VI, cl.2. The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization . . . . we have also recognized that 'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.'[13]

Indeed, in Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta,[14] the Court made clear that "[f]ederal regulations have no less pre-emptive effect than federal statutes." Thus, the Commission may preempt nonfederal zoning regulations when the nonfederal body "has created an obstacle to the accomplishment and execution of the full purposes and objectives" of the Commission acting within its congressionally delegated authority.[15]

11. When the Commission adopted the original satellite preemption rule in 1986, we concluded that we possessed the requisite authority to preempt unreasonable local regulations that stood as obstacles to accessing satellite communications. In the 1985 Notice, which led to our preemption rule in 1986, we explained our regulatory authority over satellite communications services and thus our authority over access to such services across the United

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[12] Comments of Texas and Michigan Communities at 8-16.

[13] Id. at 63-64 (citations omitted).

[14] 458 U.S. 141, 153 (1982).

[15] Id. at 156.

States.[16] We stated that the Commission had licensed carriers to provide domestic satellite services.[17] Moreover, we found that Section 1 of the Communications Act, mandating access to communications services by all people in the United States, together with numerous powers granted by Title III of the Act, and Section 705 of the Act, giving certain rights to receive unscrambled and unmarketed satellite signals, all establish the existence of a federal interest in promoting the construction and use of satellite antennas. The Commission found that some local regulations were interfering with this federal objective. The Commission also stated that it has, in prior actions, preempted state regulation that interfered with or impeded distribution of interstate communications via satellite and that its preemption has been upheld.[18] When we adopted the rule, we affirmed the bases we announced in the 1985 Notice.[19]

12. We reaffirm our legal authority to adopt our proposed rule and to preempt state and local government regulation of satellite earth stations. The federal interests at stake here are very significant. They stem from the Communications Act, which directs us to assure "to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges."[20] A Commission

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[16] 1985 Notice, 50 Fed. Reg. 13986, 139885 (1985).

[17] Id.

[18] See New York State Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984).

[19] 1986 Order at ¶ 24, (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)). Agency preemption is valid where state or local laws obstruct a congressional objective (e.g., ensuring access to satellite communications). See, e.g., New York State Commission on Cable Television v. Federal Communications Commission, 749 F.2d 804 (D.C. Cir. 1984)(affirming Commission order preempting state and local entry regulation of satellite master antenna television, where regulation conflicted with congressional mandate to foster the development of a national communications service); Evans v. Board of County Commissioners of the County of Boulder, Colorado, 994 F.2d 755, 760-61 (10th Cir. 1993)(holding that local zoning regulation did not violate Commission order preempting specific, absolute antenna height limitations but that any local ordinance which absolutely prohibits antennas over a certain height is necessarily preempted.(citations omitted)); Jackson v. Rapps, 746 F.Supp. 934, 941-43 (W.D. Mo. 1990), aff'd, 947 F.2d 332 (1991), cert. denied, 503 U.S. 960 (1992) (federal regulations preempt state policy where such policy frustrated federal objective to establish a uniform and effective method of child support enforcement in compliance with minimum federal standards).

[20] 47 U.S.C. § 151.

rule that facilitates access to communications services, including satellite services, is a means by which to promote that directive.

13. Although the local interest in this area is unquestionable, the focus must be the effect on the federal interest and the appropriate accommodation of the local interests involved. As the Commission stated in the 1986 Order, "it must be emphasized that the relative importance to states or local jurisdictions of their own laws is not the proper focus in a decision to preempt. . . . [I]t cannot be argued that preemption is automatically precluded merely because zoning has been called a traditionally local matter."[21] Not one of the various courts that have considered our preemption rule since 1986 has questioned our authority to act in this area.

14. Commenters representing local governments assert that industry representatives have overstated the federal interest in this area and, therefore, preemption is not warranted.[22] These commenters contendthat the local interest in health and safety and the obligation to maintain local property values outweigh the interest in ensuring broader access to satellite signals.[23] They state that the four million satellite earth stations in use and the broad access to cable services demonstrates that the general public has adequate access to sufficient forms of technological media.[24] One municipality asserts that Congress did not intend that the Commission preempt health and safety regulation to afford less costly and more convenient television service to a few residents.[25]

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[21] 1986 Order at ¶ 27 (citing Free v. Bland, 369 U.S. 663, 666 (1962); Fidelity Federal Savings and Loan Assoc. v. De La Cuesta, 458 U.S. 141, 153 (1982); and Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)).

[22] Comments of Texas and Michigan Communities at 8. The record also contains dozens of letters from local governments expressing similar concerns.

[23] See Comments of Township of Cannon, Michigan and Southwest Suburban Cable Commission, Minneapolis, Minnesota.

[24] Texas and Michigan Communities cite Section 556 of the Communications Act for the proposition that the Commission cannot preempt certain local health and safety regulations. We note that Section 556 only applies in areas of cable regulation and does not restrict Commission authority with respect to satellite earth station antennas. In addition, Executive Order 12866, cited at p. 21 of these comments, is not applicable to this proceeding because it specifically excludes in its coverage independent regulatory agencies such as the FCC. See 44 U.S.C. § 3502(5).

[25] Comments of Plantation, Florida at 3.

15. We disagree with Texas and Michigan that the wide availability of cable technology militates against a rule supporting access to satellite signals. We rejected this argument about cable service availability in both the 1986 Order and the Notice.[26] In fact, the Commission is committed to ensuring access to all technologies including those that compete with cable.[27] In addition, the availability of cable services in no way affects the federal interest in ensuring access to transmit-receive VSAT services used for business purposes. The revised rule merely reflects a continuation of our policy to ensure that access to satellite services is available through wide use of earth station antennas. The federal interest we are protecting is not that of ensuring that the American people can get less costly television service, but rather that they have wide access to all available technologies and information services. If nonfederal regulations are acting as obstacles to this federal interest, they are subject to preemption.

16. In the Telecommunications Act of 1996, Congress specifically directed the Commission, within 180 days, to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."[28] Thus, Congress has made clear that, at a minimum, we must preempt restrictions imposed on a subset of all satellite earth station antennas, all DBS antennas, and we address this issue in the Further Notice, infra. We believe that nothing in the new legislation affects our broad authority to preempt state and local zoning regulations that burden a user's right to receive all satellite-delivered video programming (not just the subset specifically singled out by Congress in section 207) or that inhibit the use of transmitting antennas. Indeed, we believe section 207 evidences Congress's recognition that the federal interests at stake here warrant preemption of inconsistent state and local regulations, even when those regulations address a traditionally local subject such as land

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[26] 1986 Order at ¶ 25; Notice at 3. See also, Comments of SBCA at 6 (citing the Commission's 1994 Cable Report on promotion of effective competition through alternative distribution technologies).

[27] See Comments of USSB at 5.

[28] 1996 Act § 207.

use.[29] Accordingly, we preempt state and local zoning regulations that affect satellite antennas as described in this order.

2. Necessity for rule changes

17. Initially, most commenters, including many representing local governments, acknowledge the need for changes in the present rule in light of Deerfield. For example, Duncan, Weinberg, Miller & Pembroke (Duncan), a law firm that represents many government entities, states that the "Commission is compelled to amend its rule, in light of the decision . . . to address the issues of Article III Federal Courts and of the exhaustion of remedies that concerned the Court of Appeals."[30] Satellite industry representatives agree.[31] In fact, none of the commenters in this proceeding argue that our proposal to adopt procedures for Commission review is inappropriate in light of Deerfield. The record thus supports our initial conclusion that procedural changes are necessary.

18. The record also supports our tentative conclusion that the 1986 rule needs to be clarified. Local government representatives do, however, question the extent to which the 1986 rule permitted state and local regulations to frustrate the important federal interests involved. They state that the industry "has magnified the problem in an effort to relieve themselves of legitimate local regulation."[32] According to these comments, the burden to obtain approval is usually minimal. For example, the City of Dallas states that in Dallas applicants must file an application for a building permit and the application is granted if the antenna meets minimal requirements on lot coverage, set-back, and height. Commenters also argue that the burdens involved in obtaining a zoning variance have been overstated by industry representatives. According to them, a variance requires: (a) a fee to reflect the cost of processing the application; (b) plans that in some cases can be hand drawn; and (c) a

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[29] See also 1996 Act § 205 (giving Commission exclusive jurisdiction over DBS); H.R. Rep. No. 204, 104th Cong., 1st Sess. at 123 (1995) ("Federal jurisdiction over DBS service will ensure that there is a unified national system of rules reflecting the national interstate nature of DBS service."); Telecom Act § 101 (directing the Commission to preempt any "State or local statute or regulation, or other State or local legal requirement, [that] may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service") (to be codified at 47 U.S.C. § 253).

[30] Duncan at 1; See also Comments of City of Dallas and other local communities (Dallas et. al.) at 9.

[31] Comments of SBCA at 18-21.

[32] Comments of Dallas et. al. at 8.

hearing that imposes no burden on the property owner because the locality sends out the notice and conducts the hearing.[33] In addition, they argue that the evidence given by industry is "anecdotal" and thus not demonstrative of a real problem.[34] Many jurisdictions assert that our current preemption rule is sufficient protection for antenna users.[35] For example, Plantation, Florida states that the Commission should allow local governments to engage in their own balancing analysis.[36]

19. Industry representatives counter that, in reality, the examples cited in the record are only the "tip of the iceberg" and represent only those cases where the antenna user has sufficient funds and perseverance to fight local regulations and capture the attention of the companies and associations filing comments.[37] HNS states that VSAT service providers are faced with continued and consistent discrimination from city officials who do not understand the technology.[38] They also reiterate their concern that businesses will often abandon satellite technology when the cost and delay associated with zoning become apparent.[39] HNS asserts that even before comments were received, the Commission had a substantial body of evidence that the current rule was deficient. It also cites its three petitions for declaratory relief with

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[33] Id.

[34] Comments of City of Dallas et. al.. at 9. These commenters also suggest the Commission conduct its own study to determine the need for modification of the rule. As explained above, we conclude that the record developed in response to the Notice in this proceeding is sufficient to show the need for modification.

[35] Comments of Township of Cannon, Michigan; Muskegon, Michigan.

[36] Comments of Plantation, Florida at 1.

[37] SBCA Reply Comments at 3.

[38] Comments of HNS at 26. HNS cites one example where it was denied permission to install a VSAT antenna because the city determined that the commercial establishment had no need to watch HBO.

[39] Reply comments of HNS at 3-4. See also Comments of B&H Antenna Systems (a VSAT installer).

respect to specific local zoning ordinances[40] and states that it is only the legal cost that has kept it from filing more petitions.[41] GE states that "certain overzealous zoning authorities frequently single out satellite antennas for excessive regulation that, if not banning small antennas altogether, significantly reduces their value to end-users."[42]

20. A number of VSAT users emphasize the need for a centralized communications system that can be installed quickly. For example, AutoZone states, "Saying that a timely installation of each of those antennas directly affects our ability to meet our growth projections doesn't begin to describe the importance we place on our network."[43] Similarly, Edward D. Jones & Co. states, "[W]hen a Jones Investment Representative selects a community in which to start his or her business, a critical factor in ensuring success of their business is the ability to install a satellite dish and its accompanying technology in a timely manner."[44] VSAT installers complain that they are "encumbered by a laborious permitting process in a number of jurisdictions."[45] Installers cite such requirements as engineering studies, soil tests, archeological studies, and architectural studies that significantly increase installation cost and delay completion.[46]

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[40] HNS has filed three Petitions for Declaratory Relief under our old rule. These petitions attack the validity of zoning ordinances in Coconut Creek, Florida; Coral Gables, Florida; and Greenburgh, New York. In addition, Mr. Ray Cater has filed a petition attacking the zoning policies of Prospect, Kentucky and Mr. and Mrs. Daniel Kraegel have filed a petition against Cherokee County, Georgia.

[41] HNS Comments lists at 9-10 (listing the following jurisdictions as illustrative of localities imposing unreasonable restrictions: Greenburgh, New York; Jupiter, Florida; Tempe, Arizona; West Caldwell, New Jersey; San Juan Capistrano, California; Hempstead, New York; Oradell, New Jersey; and St. Louis, Missouri).

[42] Comments of GE at 2.

[43] Comments of AutoZone.

[44] Comments of Edward D. Jones. See also Comments of Amici Corporation, Gap Inc., WINCOM Systems Inc., CVS, Builders Square, Target Stores, and Service Merchandise.

[45] Comments of Microwave, Dish & Cable.

[46] Comments of VIDCOM Corp., Burke Enterprises.

21. SBCA states that it has received at least a thousand calls in the last year from people facing either zoning or covenant restrictions on residential antenna installation.[47] SBCA also expresses concern over how these local restrictions might hamper the emergence of new services.[48] Primestar, a direct-to-home service provider that installs and leases its antennas, asserts that the record illustrates the need for revising the rule.[49] USSB, a DBS permittee, states that municipalities have enacted new regulations to deal with DBS which, at first glance, appear to be more liberal but still "improperly and unnecessarily burden" technology.[50] It also cites examples of overly restrictive local regulations included in comments filed by local governments.[51] DIRECTV, another DBS permittee, states that the new rule is necessary to protect the emergence of DBS as a competitor to cable.[52] Midwest Star Satellite offers several specific examples of problems encountered with C-band antenna installations in the Chicago area.[53] It also points out that residential users, like commercial users, will often give up their systems rather than risk the cost of litigation and the fear of harassment from the municipality.

22. In the Notice, we acknowledged that evidence indicated that local zoning regulations were inhibiting access to satellite services in various parts of the country. We tentatively concluded that local regulation had hampered implementation of existing services and would likely have a similar effect on developing services.[54] The record included examples of placement, size, or height restrictions that operate as complete bans or substantially limit reception. Commenters also complained about excessive procedural or regulatory costs imposed by the local permitting authority. Commercial service providers were especially concerned about the delay often associated with local regulation, stating that

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[47] Comments of SBCA at 17.

[48] Id at 6-9.

[49] Reply Comments of Primestar at 2; see also Reply Comments of EIA at 3.

[50] USSB at 6 citing as examples the new ordinances of Palos Verdes Estates, California and Thousand Oaks, California.

[51] Comments of USSB at 5.

[52] Comments of DIRECTV at 3.

[53] Comments of Midwest Star Satellite at ¶¶ 6-11.

[54] Notice at ¶ 43.

when they are forced to comply with unreasonable local requirements, they often lose the job to a provider of another type of technology that is not subject to zoning regulation.[55]

23. We find that the record compiled in response to the Notice supports our preliminary conclusion. We acknowledge that there are numerous local jurisdictions in this country and that our evidence relates to only a small percentage of them. However, we find that this evidence establishes the existence of a national problem. Local government representatives fail to show that non federal regulations complained about by satellite service providers either do not exist or have been changed and are thus no longer interfering with federal interests. Indeed, even those localities asserting that the burden placed on antenna installation is usually minimal acknowledge that their regulations require permits, set-back agreements and possibly variances.[56] Although the industry does not cite instances of complete antenna bans, it does cite numerous regulations that are so burdensome that antennas are rendered useless. Localities also fail to demonstrate that such regulations are justified by legitimate local objectives. Consequently, we conclude that our rule must be revised to assure access to satellite signals and to promote competition between communications services.

3. The Presumption Approach

24. In the Notice, we chose to take an approach based on presumptions, rather than either the per se approach urged by industry representatives or a reasonableness approach that employs no presumptions. At that time, the primary reason for rejecting the per se approach was our recognition of the important local interests that would be affected by our rule. As we stated in the Notice, "The importance and centrality of the local interests that would be subordinated by a per se approach lead us to embrace this more moderate alternative at this time . . ."[57]

25. The record in this proceeding supports our tentative conclusion that a rule based on presumptions of unreasonableness is less intrusive than a per se rule, albeit more difficult to administer in some instances. The comments filed by local government representatives demonstrate great concern about their continued ability to influence land uses

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[55] See Notice at ¶¶ 11-25.

[56] See Comments of the City of Coral Gables at 1 stating that municipality requires a public hearing process with notice to as many as 30 surrounding residents for each residential earth station over 24 inches in diameter.

[57] Notice at ¶ 65.

in their communities.[58] It is precisely because of these concerns that a workable set of rebuttable presumptions is preferable to a per se rule.

26. Some local government representatives argue that even our presumptive approach fails to accommodate local interests, such as protecting health and safety and maintaining property values. With respect to health and safety concerns, some localities, for example, claim that the rule will permit installation of antennas that would block a driver's view of traffic and cause accidents and deaths.[59] Such comments do not fairly reflect what we have proposed to do. Our rule only presumes unreasonable, and therefore preempts, regulation of small antennas. Large antennas -- larger than two meters -- are entitled to no presumption of unreasonableness and any reasonable regulation of such antennas as defined by our new rule, will avoid federal preemption. Antennas entitled to our presumption are no larger than many other items often found in yards, such as basketball hoops, air conditioning units, cable posts, electrical boxes, or mailboxes, none of which are typically regulated by local zoning.[60] The same is true for antennas in commercial areas where heating and cooling equipment, dumpsters, or signs are permitted. Further, even for these smaller antennas, localities may still impose reasonable safety regulations by rebutting the presumption of preemption. For antennas larger than one meter (or two meters in commercial areas), localities can impose reasonable health, safety, or aesthetic regulations that do not substantially limit reception or impose more than minimally necessary costs on users. Some set-back from a public road, for example, would appear to be a reasonable health and safety regulation under our rule as long as comparable setbacks are required for other visual obstructions. Finally, for truly unique situations, such as an architecturally historic area, a waiver procedure is available. Thus, we believe we are not stripping local governments of their power to protect the health and safety of their citizens by adopting a presumption of unreasonableness.

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[58] See, e.g., Comments of Texas and Michigan Communities; Duncan at 3 commending the Commission for this approach. Contra Comments of GE at 3 (urging adoption of per se preemption as a "bright-line" standard that is easier to enforce).

[59] Comments of Michigan and Texas Communities at 15.

[60] See Comments of John Alfe. ("Just because one person thinks a dish is ugly, doesn't mean it is unaesthetic, when the rest of the community is allowed to have pools, sheds, basketball nets and other recreational equipment"). See also Comments of Duncan at 12-3 and Madison Heights, Michigan.

27. Some local government commenters also argue that our proposals will diminish their authority to protect private property values.[61] One commenter even suggests that the rule could be construed as a government "taking" in violation of the Constitution.[62] It goes on to assert, "The proposed rule will create a diminution of value. Property owners will be economically impacted if neighbors are free to install unsafe, highly visible media monstrosities on their lot lines in the front yards. The average home buyer will not purchase, or at least not pay full market value for property that is negatively impacted by dangerous and unsightly conditions on neighboring land."[63] This assertion is not supported by any facts showing that satellite earth station antennas affect property values. As previously stated, our rule only presumes a regulation to be unreasonable if it affects very small antennas. Large antennas remain subject to reasonable aesthetic requirements. Further, commenters have failed to demonstrate that any diminution of property values is caused by the presence of small satellite earth station antennas.

B. Specific Rule Sections

28. In crafting our preemption policies, we have attempted to reflect the differences in the antennas involved and have tried to accommodate the varying local interests. The main state and local concerns regarding installation of satellite earth stations relate to aesthetics, health, and safety. These concerns would appear to be greater for larger antennas, thus the rule permits greater local regulation for larger antennas. For smaller antennas, local interests are less compelling and, accordingly, we more narrowly define permissible local regulation. After reviewing the record, we conclude that the basic thrust of our proposals is appropriate and will adequately address concerns of antenna users while accommodating interests of state and local governments. However, commenters have raised concerns about the clarity of certain portions of our rule and, accordingly, we made adjustments to the adopted version to address these problems.

1. Revised Rule

Section 25.104: Preemption of Local Zoning of Earth Stations

> (a) Any state or local zoning, land-use, building, or similar regulation that materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable, except that nonfederal

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[61] Comments of Southwest Suburban Cable Commission at 1; Comments of Texas and Michigan Communities at 19.

[62] Texas and Michigan Communities at 19.

[63] Id. at 20.

regulation of radio frequency emissions is not preempted by this rule. For purposes of this paragraph (a), reasonable means that the local regulation:

(1) has a clearly defined health, safety, or aesthetic objective that is stated in the text of the regulation itself; and

(2) furthers the stated health, safety, or aesthetic objective without unnecessarily burdening the federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing communications service providers.

(b)(1) Any state or local zoning, land-use, building, or similar regulation that affects the installation, maintenance, or use of:

(A) a satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by nonfederal land-use regulation; or

(B) a satellite earth station antenna that is one meter or less in diameter in any area, regardless of land use or zoning category

shall be presumed unreasonable and is therefore preempted subject to paragraph (b)(2). No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this presumption unless the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (e), or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to subparagraph (b)(2).

(2) Any presumption arising from subparagraph (b)(1) of this section may be rebutted upon a showing that the regulation in question:

(A) is necessary to accomplish a clearly defined and health or safety objective that is stated in the text of the regulation itself;

(B) is no more burdensome to satellite users than is necessary to achieve the health or safety objective; and

(C) is specifically applicable on its face to antennas of the class described in subparagraph (b)(1).

(c) Any person aggrieved by the application or potential application of a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting all nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by

this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when:

(1) the petitioner's application for a permit or other authorization required by the state or local authority has been denied and any administrative appeal and variance procedure has been exhausted;

(2) the petitioner's application for a permit or other authorization required by the state or local authority has been on file for ninety (90) days without final action;

(3) the petitioner has received a permit or other authorization required by the state or local authority that is conditioned upon the petitioner's expenditure of a sum of money, including costs required to screen, pole-mount, or otherwise specially install the antenna, greater than the aggregate purchase or total lease cost of the equipment as normally installed; or

(4) a state or local authority has notified the petitioner of impending civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.

(d) Procedures regarding filing of petitions requesting declaratory rulings and other related pleadings will be set forth in subsequent Public Notices. All allegations of fact contained in petitions and related pleadings must be supported by affidavit of a person or persons with personal knowledge thereof.

(e) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns are of a highly specialized or unusual nature. No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

2. Clarification regarding transmitting antennas

29. Several commenters urge that we rearrange the rule to clarify its application to transmitting antennas. For example, HNS understands that the Commission intends to give transmitting antennas the same protection as receiving antennas with the exception of issues

related to RF emission.[64] However, HNS asserts that the structure of the proposed rule, with transmitting facilities not mentioned at the outset, does not accomplish this objective as clearly as it should. HNS urges us to restructure the rule and to refer in paragraph (a) specifically to local regulations that limit transmission as well as reception.[65] GE also stresses the need to clarify that the rule extends to transmitting antennas.[66]

30. We agree that a reworded rule would be clearer. Therefore, the rule we adopt specifically includes transmitting facilities, with the exception of RF emission hazard regulation, in the scope of the first paragraph.

3. Operation of Presumptions

31. HNS requests clarification that if an antenna is within the category covered by the presumption of unreasonableness, a user can install it without seeking a declaration from the Commission that the local ordinance is preempted. Then, if the locality has an objection that is arguably within the purview of a rebuttal, the local authority can enforce its ordinance by rebutting the presumption as in subparagraph (b)(2). We agree that in order for the presumptions to be effective, the burden should fall on the localities to justify regulation of small antennas. Because such regulation is presumed unreasonable, users should be free to install antennas covered by the presumption without first proving the unreasonableness of the local requirement. Accordingly, we have adopted DIRECTV's suggestion that the words "therefore preempted" be added to section (b)(1) of the rule..[67] In addition, we have added language to assure that local authorities can not take enforcement action until their regulation is deemed in compliance with our rule.[68] We caution users that a particular local ordinance may have previously been declared not to be preempted, either because the local authority has obtained a waiver from the Commission pursuant to subparagraph (e), or because the local authority has rebutted the presumption of preemption based on subparagraph (b)(2).

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[64] Contra Comments of Duncan at 5 which state, without explanation, that "widespread transmission capability could have significant consequences at the local level, different from mere reception capability" .

[65] HNS Comments at 14.

[66] GE Comments at 6.

[67] See Comments of DIRECTV at 6; HNS at 23-24.

[68] Consumers are not liable for any penalties that may accrue for noncompliance with a regulation during the pendency of any case brought for determination of the reasonableness of that regulation.

32. Local government representatives claim that the presumptions shift the burden of persuasion to the locality and that this violates established state law precedent holding that local laws are presumed valid.[69] These commenters state that placing the burden on the local government will encourage antenna users, who do not have to sustain a burden of proof, to file petitions with the Commission. Commenters' argument that our system of presumptions illegally shifts justification burdens is not determinative. Our preemption, by its nature, replaces the state or local law with our federal rule. Moreover, in adopting our rule, we are establishing a test by which both municipalities and consumers can determine the applicability of local regulations. Ordinances that meet this test will be presumed valid unless shown otherwise under the general test for reasonableness. The presumptions are designed to clarify for all parties the extent of permissible local regulation and thus should decrease, not increase, the number of petitions.

33. With respect to the size of antenna covered by a presumption, the record demonstrates that the one- and two-meter proposals accurately reflect the current state of the industry. According to commenters, most DTH services provided by higher-power satellites use antennas less than one meter in diameter.[70] Likewise for commercial areas, the two-meter size appears to encompass most antennas used by VSAT providers.[71]

34. GE urges us to change the geographic designation in the presumption for two-meter antennas.[72] The rule we proposed limits the presumption to areas where commercial uses are "generally permitted" and GE asks that this be changed to "in fact permitted". According to GE, one of its largest VSAT customers is a national drugstore chain and this type of facility could be located in an area where commercial uses are not "generally permitted". GE asserts that if a commercial establishment is in fact operating in a particular area, it should be permitted to install a VSAT antenna. We decline to make this change. As GE points out, land-use authorities sometimes make case-by-case exceptions to allow one or two particular businesses to operate in a neighborhood where commercial uses are generally forbidden. They may do so based on very specific proposals (e.g., a drugstore in a Victorian

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[69] Dallas at 17.

[70] See Comments of DIRECTVat 2, USSB at 10 and Primestar at 3. We refuse to adopt the suggestion of Sony that the size be reduced to 24 inches because this limit would exclude several existing services that are using slightly larger antennas. See also Comments of Duncan at 11 that urge a size based on the smallest size antennas proposed for use; Comments of Midwest Star Satellite at ¶ 31, suggesting that the size be raised to three meters.

[71] See Comments of HNS at 21, GE at 10.

[72] Comments of GE at 12.

house) or strict conditions (e.g., on signage or dumpsters) designed to preserve the neighborhood's non-commercial character. We do not believe these situations, which are by definition exceptional, should be subject to a general presumption. Nor do we believe that local balances already carefully struck for discrete parcels of land should be upset after the fact by a federal rule that commercial use carries with it the right to a VSAT antenna. Again, however, these cases are fully subject to our general preemption rule, stated in section 25.104(a), and a locality that has not otherwise restricted the trappings of commercial activity in a non-commercial neighborhood will find it more difficult to justify antenna regulation in such areas on aesthetic grounds.

35. The presumption against local regulation can be rebutted by a demonstration of the necessity for health and safety regulation. MCI suggests that the word "reasonable" be added to the presumption to assure that local regulations are carefully tailored to meet their objective. We believe that this addition would add complexity to the rule and is unnecessary. Under the rule as originally proposed, local governments are required to be reasonable. A local ordinance, for example, could not use RF emission hazard concerns as a basis to regulate receive-only antennas that do not emit radiation. Similarly, safety regulations must be realistic and not discriminate against satellite earth station antennas. For example, the city of Plantation, Florida argues that localities in hurricane-prone areas should have blanket waivers to impose more stringent safety regulations. However, HNS points out that during Hurricane Andrew, none of its antennas were lost where the underlying building was not destroyed. According to HNS, the antennas remained secure while the air conditioning units next to them were ripped off the roof.[73] If a local government can demonstrate that a health or safety requirement meets the criteria for rebuttal, its regulation is not preempted. For example, local regulations that address require secure antenna mounting, require clearance of electric wires, or restrict access by children would appear to be reasonable under our rule. We note that these precautions would probably be taken in any event by consumers or professional installers. We also emphasize that a locality cannot rebut the presumption covering small antennas with aesthetic concerns.[74]

36. SBCA states that larger C-band antennas that range in size from 6 to 7.5 feet can be disguised as rocks or umbrellas. SBCA suggests that such disguised antennas be included under the presumption of unreasonable regulation. We decline to adopt this suggestion as we believe it would complicate the application of the rule. A size designation is a more objective standard, whereas the concept of disguise could introduce uncertainty to the rule. We emphasize, however, that in challenging the reasonableness of particular regulations, it may well be easier to attack restrictions on antennas that have been made to look like

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[73] HNS Ex Parte presentation on November 14, 1995.

[74] See Comments of GE at 13. Duncan at 12-13 expresses concerns about particular areas such a historic districts that can be addressed in waiver requests. See also Comments of Madison Heights, Michigan.

natural objects or like other non-obtrusive structures commonly found in residential neighborhoods, at least when those restrictions are based on aesthetic grounds.

37. We also are changing former sections (b) and (c) to clarify the relationship between presumption and rebuttal, and between the rebuttable presumption on one hand and the general reasonableness standard on the other. First, we have combined paragraphs (b) and (c) of our proposed rule into one new paragraph (b) governing the entire system of rebuttable presumptions. Second, we have modified paragraph (b)(1) to make clear that the presumption of unreasonableness applies only to small (2 meters or less) satellite antennas. We believe the changes we adopt will clarify how the system of rebuttable presumption fits together with the general preemption rule. Therefore, we will change paragraph section (b)(1) to say

> "Any state or local zoning, land-use, building, or similar regulation that affects the installation, maintenance, or use of:
>
> > (A) a satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by nonfederal land-use regulation; or
> >
> > (B) a satellite earth station antenna that is one meter or less in diameter in any area, regardless of land use or zoning category
>
> shall be presumed unreasonable and is therefore preempted subject to paragraph (b)(2). No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this presumption unless the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (e), or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to subparagraph (b)(2)."

4. Revision of reasonableness standard

38. Paragraph (a) of the rule contains the basic reasonableness test to determine whether a local regulation is preempted.[75] Our proposal contained several revisions of the old rule: eliminating the threshold discrimination test, requiring that the locality's legislative objective be expressly stated, and requiring that the burdens imposed by the regulation be balanced against the federal interest in promoting competition in and access to satellite services.

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[75] We believe that the operation of the reasonableness test will accomplish the same objective as the alternatives suggested by the City of Dallas etc. in their comments at 14.

39. Comments filed in response to the Notice suggested some additions and changes to our proposal. Commenters were especially concerned about the term "substantial costs" in paragraph (a). This section would preempt nonfederal regulations that impose substantial costs on antenna users unless such costs are demonstrably reasonable. As the Notice explained, "substantial" is not the same as "enough to be reasonable" and is a low threshold showing that a federal interest has been impacted in a manner that is "not insignificant."[76] Several commenters expressed concern that the use of the word "substantial" does not clearly convey our intent that the financial burden be minimal. GE, for example, suggests that "material" would be a clearer measure.[77] SBCA suggests that only "de minimis" costs be permitted.[78] Primestar and DIRECTV urge that the Commission should preempt all costs or fees for consumer use antennas. Primestar also argues that when calculating a permissible fee, a local government must consider services where customers lease antennas and whose entry costs are necessarily lower than those which require an up front purchase. Primestar also urges that time burden and service delay should be factored into a consideration of costs. NTCA argues that if providers are going to be required to pay for spectrum, additional local costs should not be permitted. HNS urges adoption of a bright-line test to define substantial costs. For business use antennas, HNS argues that the following nonfederal requirements should be deemed substantial:

i. Imposition of more that $50 in costs, including governmental fees, engineering or legal fees, and the cost of any construction or alteration necessitated by the regulation:
ii. being required to wait more than seven days for a permit or other authorization before installation is allowed; and
iii. being required to attend a hearing or meeting of any kind.[79]

40. Local governments, on the other hand, argue that the Commission's rule allows them to collect reasonable costs based on permit and inspection fees so that costs attributable to the satellite industry be paid by those who benefit from the technology and not be passed

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[76] Notice at ¶ 58.

[77] See also Comments of Primestar at 5, MCI at 2.

[78] Comments of SBCA at 26.

[79] Comments of HNS at 18.

on to the taxpayer in general.[80] One group suggests that the Commission abolish its own fee system if it preempts local fees.[81]

41. In response to the requests for greater clarity, we are changing the threshold for costs to "more than minimal" instead of "substantial".[82] We believe that this better conveys the nature of the costs we believe should be imposed on antenna users absent specific justification. Thus, any nonfederal costs including those related to permitting or installation requirements must be very low or must be justified by the governmental entity imposing them pursuant to paragraphs (a)(1) and (2). In addition, any costs imposed on users of small antennas as defined in paragraph (b)(1) are presumed to be unreasonable and therefore preempted unless the imposing authority affirmatively rebuts the presumption using the higher standard of paragraph (b)(2). We believe that this change will address the concerns of local governments as well. Under our rule, if a city can demonstrate that circumstances make it necessary to require a permit, a fee for such a permit may be charged if it reasonably reflects the city's costs in processing an application. The key words in this analysis are "reasonable" and "necessary". For example, it would not appear to be either reasonable or necessary to require a permit for a consumer-installed, 18-inch DBS antenna and thus a corresponding fee would also be unwarranted. For a larger antenna, a permitting process with a required fee might be appropriate as long as the requirements for the permit and the fee are the minimum necessary to accomplish a permissible local objective.

42. GE asserts that local governments should be required to include their legislative objective in the text of the specific regulation on satellite earth station antennas.[83] It states that this would then ensure that a regulation's objective is directly related to antennas and is not merely part of a general building code that may or may not specifically apply. Texas and Michigan Communities object to this suggestion on the ground that this will force amendment of many local codes.[84] We agree with GE and have accordingly changed our proposal to reflect the requirement that the objective be expressly stated in the text of the antenna regulation. We believe this will assure that antenna users will be more likely to be aware of a specific regulation and that localities will more narrowly tailor their requirements. We also

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[80] Comments of Texas and Michigan Communities at 28. This commenter also complains that the term "substantial" is unclear.

[81] Comments of Southwest Suburban Cable Commission at 2.

[82] We decline to adopt HNS's bright-line test because we are concerned that it too narrowly addresses possible costs.

[83] Comments of GE at 8.

[84] Comments of Dallas at 18.

note that, in light of the significant changes in our rule, many local codes will have to be amended in any event.

43. GE argues that we should change the standard from "substantially" limits reception to "materially" limits.[85] We agree that this term more accurately reflects the limited burden that should be placed on the use of satellite earth station facilities by local governments.

44. Finally, the rule we adopt clarifies the federal interests that must not be unnecessarily burdened by local regulation.[86] As stated in the Notice, there is a strong federal interest in ensuring access to a variety of communications services including satellite services, and in adopting pro-competitive regulatory policies that facilitate such access.[87] In addition, we have clarified how federal interests should be accommodated.

4. Procedures for Commission review

45. In the Notice, the Commission concluded that it is time to abandon its policy requiring exhaustion of all remedies in light of the Deerfield case and because of concerns raised by satellite earth station antenna users. After meeting with industry representatives prior to the adoption of the Notice, representatives of local governments acknowledged the need for Commission review of certain disputes.[88] Accordingly, we proposed procedures for review of zoning cases after nonfederal administrative remedies have been exhausted. We also announced our intention to receive, during this rulemaking, petitions for declaratory rulings on the validity of local ordinances under the 1986 rule.

46. Based on the comments filed and on the five petitions we have received, the major issue with respect to Commission review is the question of when administrative remedies have been exhausted. First, parties representing industry complain that the 90-day waiting period in our proposal is too long and that local authorities should be able to rule on applications within 30 days.[89] Local governments, on the other hand, assert that 90 days is

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[85] Comments of GE at 7. See also Comments of Midwest Star Satellite at ¶ 44.

[86] See Comments of Duncan at 9.

[87] See Comments of GE at 9; 1986 Order.

[88] Notice at ¶ 38. Accord, Comments of Duncan at 1; Texas and Michigan Communities at 9.

[89] See, e.g., Comments of Primestar at 8, SBCA at 35, HNS at 8, and MCI Reply Comments at 6.

too short and that they should not be forced to comply with a specific deadline.[90] On balance, we adopt our 90-day proposal as a reasonable amount of time for a local ruling.[91] Local officials need to have time to act within their own processes. An unreasonably short period could result in a greater volume of cases filed with the Commission. However, the record supports our conclusion that there should be a time after which delay becomes unreasonable and local remedies are not working. We believe that 90 days strikes the appropriate balance.

47. Local governments have expressed concern that complying with review procedures will require appearances before the Commission and will be unduly expensive.[92] We emphasize that our intention is to adopt simple procedures that require only paper filings -- not personal appearances. Antenna users and local governments are also free to pursue litigation remedies in federal or state courts if they wish to forfeit Commission review. In addition, we disagree with comments that suggest we include procedures to allow participation of adjacent property owners in disputes before the Commission as such participation would not be relevant in the context of a determination of the reasonableness of a particular ordinance as applied.[93]

48. Another issue that has been raised is whether exhaustion of nonfederal remedies includes exhaustion of available variance procedures. The rule we are adopting requires antenna users to exhaust all nonfederal administrative remedies before seeking Commission review of a local zoning decision. We strongly believe that local governments need to have the opportunity to review their own land-use decisions. Exhaustion, however, has been defined in a variety of ways. Subparagraph (c)(1) outlines the most straightforward type of exhaustion -- a final denial of a necessary permit with no possibility of appeal. For purposes of this path to exhaustion, we think it is appropriate to require users to apply for variances if necessary. However, there are other paths outlined in subparagraphs (c)(2) through (4), and the mere availability of a variance procedure has no effect upon these other paths.

49. Industry representatives suggest that the cost threshold for exhaustion be lowered.[94] MCI suggests that costs not exceed those for a typical over-the-air antenna or the

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[90] Comments of Madison Heights, Michigan at 1; Dallas at 19.

[91] See Comments of U.S.S.B. at 15 asserting that the period be no longer than 90 days.

[92] Texas at 5. Commenters representing the satellite industry complain that complying with the Commission's previous exhaustion of litigation remedies was so burdensome as to force users to abandon satellite technology altogether. Comments of HNS at iii.

[93] Reply comments of City of Dallas etc. at 6.

[94] Eg., Comments of Midwest Star Satellite at ¶ 45.